BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 ARCH STREET
PHILADELPHIA, PENNSYLVANIA 19103

IN THE MATTER OF:	: Docket No. CWA-III-219
	:
CITY OF SALISBURY	:
SALISBURY, MD 21803	: PROCEEDINGS TO ASSESS CLASS I
NPDES PERMIT NO. MD0021571	: ADMINISTRATIVE PENALTY
	: UNDER CLEAN WATER ACT
	: SECTION 309(g)
	:

99 MAY 21 PM 4:25

COMPLAINANT'S MOTION FOR AN ACCELERATED DECISION ON LIABILITY

This is a Clean Water Act ("CWA" or "the Act") enforcement proceeding for the assessment of administrative penalties under subsection 309(g) of the CWA, 33 U.S.C. section 1319(g). EPA initiated this action by issuance of the Complaint against The City of Salisbury (hereinafter "Respondent") on July 15, 1998. Respondent served its Motion to Dismiss and in the Alternative Response to Administrative complaint, Findings of Violations, Notice of Proposed Assessment and Request for Hearing ("Answer") on August 14, 1998.

The Complaint alleges three types of violations, all related to Respondent's sludge generation and land application processes: 1) pollutant limit violations; 2) failure to report data regarding the concentration of pollutants in its sludge; and 3) failure to monitor sample for two required pollutants during one quarter. Each of these are violations of the sludge regulating provisions of the Clean Water Act, 33 U.S.C. section 405 and its implementing regulations, 40 CFR part 503.

Complainant respectfully requests that, for the reasons set forth in the accompanying

memorandum, accelerated decision as to liability for all three types of these violations be entered in favor of Complainant. In the alternative, since partial accelerated decisions are allowable under 40 CFR part 22.20, Complainant seeks an accelerated decision on every element for which the Court determines no genuine issue of material fact exists.

Respectfully submitted,

Date: 5/21/99

Kerry Nelson
Assistant Regional Counsel
Office of Regional Counsel

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	: SECTION 309(g)

ORDER

AND NOW this _____ day of _____, 1999 upon consideration of Complainant's Motion for an Accelerated Decision on Liability, Respondent's response thereto, if any, and Complainant's reply, if any

IT IS HEREBY ORDERED that Complainant's motion is granted and an accelerated decision is entered on behalf of Complainant as to all allegations of the Complaint.

Dated: _____

_____
Hon. Susan L. Biro

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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MEMORANDUM IN SUPPORT OF
COMPLAINANT'S MOTION FOR AN
ACCELERATED DECISION ON LIABILITY

Complainant, United States Environmental Protection Agency ("EPA"), submits the following in support of its Motion for an Accelerated Decision on Liability.

I. INTRODUCTION

This is a Clean Water Act ("CWA" or "the Act") enforcement proceeding for the assessment of administrative penalties under subsection 309(g) of the CWA, 33 U.S.C. section 1319(g). EPA initiated this action by issuance of the Complaint against The City of Salisbury (hereinafter "Respondent") on July 15, 1998. Respondent served its Motion to Dismiss and in the Alternative Response to Administrative complaint, Findings of Violations, Notice of Proposed Assessment and Request for Hearing ("Answer") on August 14, 1998. The Complaint alleges three types of violations, all related to Respondent's sludge generation and land application processes: 1) pollutant limit violations; 2) failure to report data regarding the

concentration of pollutants in its sludge; and 3) failure to monitor sample for two required pollutants during one quarter. Each of these are violations of the sludge regulating provisions of section 405 of the Clean Water Act, 33 U.S.C. section 1345 and its implementing regulations, 40 CFR part 503. In this motion, Complainant seeks an accelerated decision as to liability for all three types of these violations.

Respondent's Answer to the Complaint, the admissions contained in Respondent's Discharge Monitoring Reports ("DMRs") and in other documents in the record show that there is no genuine issue of material fact as to the Respondent's liability, and that the Complainant is entitled to an accelerated decision as a matter of law. [1]

II. STATUTORY BACKGROUND

Congress enacted the Federal Water Pollution Control Act , 33 U.S.C. sections 1251 et seq., Clean Water Act sections 101 et seq. ("Clean Water Act" or "Act"), to "restore and maintain the chemical, physical and biological integrity of the Nation's waters. 33 U.S.C. section 1251, Clean Water Act 101. To that end, the Clean Water Act regulates the disposal and use of sludge generated from the treatment of municipal sewage and industrial waste. In particular, the Act required the Environmental Protection Agency ("EPA") to develop regulations which

> (A) identify uses for sludge, including disposal;
> (B) specify factors to be taken into account in determining the measures and

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1 EPA's Complaint also seeks administrative penalties. However, Complainant's Motion does not request an accelerated decision on the appropriateness of the proposed penalty. That determination is left for the hearing in this matter, or additional briefs, if so desired by the Court.

practices applicable to each such use or disposal (including publication of information on costs);

(C) identify concentrations of pollutants which interfere with each such use or disposal.

33 U.S.C. section 1345(d)(1).

Those regulations, which appear at 40 CFR part 503, impose requirements on persons engaging in these activities, including monitoring, recordkeeping, reporting and, for land applied sludge, limits on the concentrations of certain specified pollutants.

The data gathering and recordkeeping requirements of 40 CFR part 503.17(a) require a generator [2] to, *inter alia*, develop certain information about its sludge including the concentration of certain specified pollutants contained in it. 40 CFR part 503.17(a).[3] The minimum frequency with which a generator must sample to develop such information depends upon the amount of bulk sewage sludge applied to the land annually. 40 CFR part 503.16. An other regulatory provision, 40 CFR part 503.18(a)(1), requires certain generators to report the information they have developed under part 503.17, about the concentrations of pollutants in their sludge, to the EPA annually.

For those generator's whose sludge will be applied to the land for agricultural purposes,

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2 40 CFR part 503.17(a) actually speaks in terms of the sludge "preparer." However, 40 CFR part 503.9 defines a "person who prepares sewage sludge" as one who "generates the sewage sludge during the treatment of domestic sewage in a treatment works or the person who derives a material from sewage sludge."

3 This requirement to develop information about pollutants is contained in a number of different parts of part 503.17(a). The specific subsection of 503.17(a) which applies to any particular generator depends upon a variety of a factors associated with that generator's chosen method of generating and preparing its sludge. (The regulations allow sludge producers great latitude in choosing the methods which work best for them. Thus, it provides for differences depending on whether the generator wishes to package its sludge in bulk for land application or whether it will sell or give its sludge away in a bag or other container. It also allows for a variety of different methods of treatment for pathogens and vectors.) Therefore, the requirement to generate information on the concentrations of the enumerated pollutants may be contained in either 40 CFR part 503.17(a)(1)(I),(2)(I), (3)(I)(A),(4)(I)(A),(5)(I)(A) or (6)(ii), depending upon the generator's chosen method of sludge preparation.

part 503 also provides limits on the amount of certain pollutants sludge may contain . It provides, *inter alia*, that:

> Bulk sewage sludge or sewage sludge sold or given away in a bag or other container shall not be applied to the land if the concentration of any pollutant in the sewage sludge exceeds the ceiling concentration for the pollutant in Table 1 . . . .

40 CFR part 503.13(a)(1). The Table 1 ceiling concentrations are as follows:

Pollutant	Ceiling concentration in mg/kg
Arsenic	75
Cadmium	85
Copper	4300
Lead	840
Mercury	57
Molybdenum	75
Nickel	420
Selenium	100
Zinc	7500

40 CFR part 503.13(b)(1).

The Clean Water Act is a strict liability statute. See *e.g.* In re Town of Luray, Docket No. CWA-III-185, 1997 CWA Lexis 10 (November 4, 1997, ALJ Kuhlmann), citing Stoddard v. Western Carolina Regional Sewer Authority, 784 F. 2d 1200, 1208 (4th Cir. 1986) (Ex.10). Section 309(g) of the Clean Water Act, 33 U.S.C. section 1319(g) authorizes the Administrator to seek administrative penalties for violations of the Act or the terms and conditions of an NPDES permit issued pursuant to the Act. Section 309(g) provides for civil penalties of up to $10,000 per day for each violation in a Class I administrative proceeding, with a maximum penalty not to exceed $25,000 and, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement act of 1996 and the Civil

Monetary Penalty Inflation Adjustment Rule, 40 CFR part 19, $11,000 per day for each violation which occurred after January 31, 1997, and a maximum penalty of $27,500. 33 U.S.C. section 1319(g).

III. STATEMENT OF UNDISPUTED FACTS

1. Respondent owns and operates a publicly owed treatment works ("POTW") located at Marine Road, Salisbury, Maryland 21803, which treats domestic sewage.[4]

2. Pursuant to section 402 of the Act, 33 U.S.C. section 1342, and the provisions of Title 9 of the Environment Article, Annotated Code of Maryland and regulations promulgated thereunder, the Maryland Department of the Environment (MDE) issued National Pollutant Discharge Elimination System Permit No. MD0021571 to the City of Salisbury for the discharge of pollutants from its POTW, effective September 1, 1985 ("1985 Permit"). The 1985 Permit was to expire by its own terms on June 30, 1990, but was administratively extended by the MDE. The Permit was then reissued with an effective date of May 1, 1997 ("1997" Permit). The 1997 Permit is due to expire on April 30, 2002.[5]

3. For the months of February through August 1996 and October 1996 through March 1997, Respondent sampled its sludge and performed analyses for the following metals: cadmium, copper, nickel, lead, zinc, and mercury. In addition, for the months of April, July,

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4 Administrative Complaint, Findings of Violations, Notice of Proposed Assessment of a Civil Penalty, and Notice of Opportunity to Request a Hearing Thereon ("Complaint") ¶ 3, (appended hereto as Exhibit 1 ("Ex.1")), Motion to Dismiss and in the Alternative Response to Administrative Complaint, Findings of Violations, Notice of Proposed Assessment and Request for Hearing ("Answer") ¶ 2, (Ex.2).

5 Complaint ¶ 5, (Ex.1); Answer ¶ 4 (Ex.2).

August and October of 1996 as well as for January through March of 1997 Respondent also analyzed for arsenic, molybdenum and selenium.[6]

4. Respondent sampled its sewage sludge on April 19, 1996 and the analytical results stated that it contained 97 mg/kg of arsenic.[7] Respondent reported that value to EPA on its DMR for the second quarter of 1996 and certified to its accuracy.[8] Respondent applied that sludge to agricultural land on April 19, May 2 and 15, 1996.[9]

5. Respondent sampled its sewage sludge on June 25, 1996 and the analytical results stated that it contained 2100 mg/kg of nickel.[10] Respondent did not report that value to EPA on DMR for the second quarter of 1996. Rather it reported that during that quarter the concentration of nickel in its sludge was 1100 mg/kg.[11] Respondent applied that sludge to agricultural land on June 26, 27, July 2, 8-11, 17, 18 and 22, 1996.[12]

6. Respondent sampled its sewage sludge on August 26, 1996 and the analytical

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6 Letter from T. Maslany (EPA) to D. Winslow (City of Salisbury) dated April 29, 1998 ("308 letter"), enclosure question 1, (Ex.3); Letter from D. Winslow (Salisbury) to T. Maslany (EPA) dated June 12, 1998 ("308 response"), enclosure response 1 including table entitled "Metal Concentrations," (Ex.4).

7 308 letter, enclosure questions 1 and 2 (Ex.3); 308 response, enclosure responses 1, 2&3 including table entitled "Metal Concentrations," (Ex.4)

8 See letter from A. Porianda (Salisbury) to A. Carkhuff (EPA) dated January 17, 1997 ("Annual Report for Year 1996"), particularly DMR for 2nd quarter (Ex.5).

9 308 letter, enclosure questions 1, 2 and 8 (Ex.3); 308 response, enclosure responses 1, 2&3, 8, 8a and 8e including tables entitled "Metal Concentrations" and "Sludge Land Application Data Sheet," (Ex.4).

10 308 letter, enclosure questions 1 and 2 (Ex.3); 308 response, enclosure response 1, 2&3 including table entitled "Metal Concentrations," (Ex.4)

11 Annual Report for Year 1996, particularly DMR for 2nd quarter, (Ex.5).

12 308 letter, enclosure questions 1, 2 and 8 (Ex.3); 308 response, enclosure responses 1, 2&3, 8, 8a and 8e including tables entitled "Metals Concentrations" and "Sludge Land Application Data Sheet," (Ex.4).

results stated that it contained 150 mg/kg of molybdenum.[13] Respondent did not report that value to EPA on DMR for the third quarter of 1996. Rather it reported that during that quarter the concentration of molybdenum in its sludge was non-detectible.[14] Respondent applied that sludge to agricultural land on August 26, September 20, 23 and 24, 1996.[15]

7. Respondent sampled its sewage sludge on March 18, 1997 and the analytical result stated that it contained 370 mg/kg of cadmium and 1100 mg/kg of nickel.[16] Respondent reported that value to EPA on its DMR for the first quarter of 1997.[17] Respondent applied that sludge to agricultural land on March 18, 24 and April 7- 9, 1997.[18]

8. Respondent generates sewage sludge during the treatment of domestic sewage in a treatment works.[19]

9. Respondent's POTW has a design flow capacity in excess of one million gallons

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13 308 letter, enclosure question 1 (Ex.3); 308 response, enclosure response 1 including table entitled "Metal Concentrations," (Ex.4)

14 Annual Report for Year 1996, particularly DMR for 3rd quarter, (Ex.5).

15 308 letter, enclosure questions 1, 2 and 8 (Ex.3); 308 response, enclosure responses 1, 2&3, 8, 8a and 8e including tables entitled "Metals Concentrations" and "Sludge Land Application Data Sheet," (Ex.4).

16 308 letter, enclosure question 1 (Ex.3); 308 response, enclosure responses 1 including table entitled "Metal Concentrations," (Ex.4).

17 DMR for period 1/1/97 through 3/31/97, (Ex.6).

18 308 letter, enclosure questions 1, 2 and 8 (Ex.3); 308 response, enclosure responses 1, 2&3, 8, 8a and 8e including tables entitled "Metals Concentrations". and "Sludge Land Application Data Sheet," (Ex.4).

19 Annual Report for Year 1996, enclosure pages entitled "Septage/Liquid Waste Treatment Facility; Operating Description and Operation Plan and Record Procedure," (Ex.5); 308 response, enclosure response 10a, (Ex.4).

per day and is required to operate and maintain a an approved pretreatment program.[20]

10. During the first quarter of 1996 Respondent sampled its sludge twice, i.e., February 21 and March 18 and the analytical results stated that it contained 660 mg/kg and 590 mg/kg of copper, respectively.[21] When Respondent reported to EPA data for the first quarter of 1996, however, it reported only that for the time period its sludge contained 590 mg/kg of copper.[22]

11. During the first quarter of 1996 Respondent sampled its sludge twice, i.e., February 21 and March 18 and the analytical results stated that it contained 78 mg/kg and nondetectable amounts of nickel, respectively.[23] When Respondent reported to EPA data for the first quarter of 1996, however, it reported only that for the time period its sludge contained nondetectable amounts of nickel.[24]

12. During the first quarter of 1996 Respondent sampled its sludge twice, i.e, February 21 and March 18 and the analytical results stated that it contained 330 mg/kg and

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20 NPDES permit number MD 0021571 effective September 1, 1985 at page 5 of 20; modification of NPDES permit number MD 0021571 effective February 1, 1988 at page 5 of 20 (required to have a pretreatment program); NPDES permit number MD 0021571 effective September 1, 1985 at pages 2 through 4 of 20 (identifying flow as 4.4 mgd or 6.8 mgd), modification of NPDES permit number MD 0021571 effective February 1, 1988 at page 3 of 20 (identifying flow as 6.5 mgd), (Ex.7).

21 308 letter, enclosure question 1 (Ex.3); 308 response, enclosure response 1 including table entitled "Metal Concentrations," (Ex.4).

22 Annual Report for the Year 1996, particularly DMR for 1st quarter, (Ex.5).

23 308 letter, enclosure question 1 (Ex.3); 308 response, enclosure response 1 including table entitled "Metals Concentrations," (Ex.4).

24 Annual Report for Year 1996, particularly DMR for 1st quarter, (Ex.5)

nondetectable amounts of lead, respectively.[25] When Respondent reported to EPA data for the first quarter of 1996, however, it reported only that for the time period its sludge contained nondetectable amounts of lead.[26]

13. During the second quarter of 1996 Respondent sampled its sludge three times, i.e., April 19, May 29, and June 25 and the analytical results stated that it contained 490 mg/kg, 560 mg/kg, and 500 mg/kg of copper, respectively.[27] When Respondent reported to EPA data for the second quarter of 1996, however, it reported only that for the time period its sludge contained 490 mg/kg of copper.[28]

14. During the second quarter of 1996 Respondent sampled its sludge three times, i.e., April 19, May 29, and June 25 and the analytical results stated that it contained 220 mg/kg, nondetectable amounts, and 2100 mg/kg of nickel, respectively.[29] When Respondent reported to EPA data for the second quarter of 1996, however, it reported only that for the time period its sludge contained 220 mg/kg of nickel.[30]

15. During the second quarter of 1996 Respondent sampled its sludge three times, i.e.,

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25 308 letter, enclosure question 1 (Ex.3); 308 response, enclosure response 1 including table entitled "Metals Concentrations," (Ex.4).

26 Annual Report for Year 1996, particularly DMR for 1st quarter, (Ex.5).

27 308 letter, enclosure question 1 (Ex.3); 308 response, enclosure response 1 including table entitled "Metal Concentrations," (Ex.4).

28 Annual Report for Year 1996, particularly DMR for 2nd quarter, (Ex.5).

29 308 letter, enclosure question 1 (Ex.3); 308 response, enclosure response 1 including table entitled "Metal Concentrations," (Ex.4).

30 Annual Report for Year 1996, particularly DMR for 2nd quarter, (Ex.5).

April 19, May 29, and June 25 and the analytical results stated that it contained nondetectable amounts, 320 mg/kg, and nondetectable amounts of Lead, respectively.[31] When Respondent reported to EPA data for the second quarter of 1996, however, it reported only that for the time period its sludge contained nondetectable amounts of Lead.[32]

16. During the second quarter of 1996 Respondent sampled its sludge three times, i.e., April 19, May 29, and June 25 and the analytical results stated that it contained nondetectable amounts, 2.9 mg/kg, and 3.8 mg/kg of Mercury, respectively.[33] When Respondent reported to EPA data for the second quarter of 1996, however, it reported only that for the time period its sludge contained nondetectable amounts of Mercury.[34]

17. During the third quarter of 1996 Respondent sampled its sludge twice, i.e., July 24 and August 26 and the analytical results stated that it contained 160 mg/kg and 710 mg/kg of Copper, respectively.[35] When Respondent reported to EPA data for the third quarter of 1996, however, it reported only that for the time period its sludge contained 160 mg/kg of Copper.[36]

18. During the third quarter of 1996 Respondent sampled its sludge twice, i.e., July 24

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31 308 letter, enclosure question 1 (Ex.3); 308 response, enclosure response 1 including table entitled "Metals Concentrations." (Ex.4).

32 Annual Report for Year 1996, particularly DMR for 2nd quarter, (Ex.5).

33 308 letter, enclosure question 1 (Ex.3); 308 response, enclosure response 1 including table entitled "Metals Concentrations," (Ex.4).

34 Annual Report for Year 1996, particularly DMR for 2nd quarter, (Ex.5).

35 308 letter, enclosure question 1 (Ex.3); 308 response, enclosure response 1 including table entitled "Metals Concentrations," (Ex.4).

36 Annual Report for Year 1996, particularly DMR for 3rd quarter, (Ex.5).

and August 26 and the analytical results stated that it contained 350 mg/kg and 1200 mg/kg of Zinc, respectively.[37] When Respondent provided data for the third quarter of 1996, however, it reported only that for the time period its sludge contained 350 mg/kg of Zinc.[38]

19. During the fourth quarter of 1996 Respondent sampled its sludge three times, i.e., October 22, November 29, and December 3 and the analytical results stated that it contained nondetectable, nondetectable, and 35 mg/kg of Nickel, respectively.[39] When Respondent provided data for the fourth quarter of 1996, however, it reported only that for the time period its sludge contained nondetectable amounts of nickel.[40]

20. During the fourth quarter of 1996 Respondent sampled its sludge three times, i.e., October 22, November 29, and December 3 and the analytical results stated that it contained nondetectable, nondetectable, and 94 mg/kg of Lead, respectively.[41] When Respondent provided data for the fourth quarter of 1996, however, it reported only that for the time period its sludge contained nondetectable amounts of Lead.[42]

21. Respondent land applied 335.84 dry metric tons of sewage sludge during 1996

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37 308 letter, enclosure question 1 (Ex.3); 308 response, enclosure response 1 including table entitled "Metals Concentrations," (Ex.4).

38 Annual Report for Year 1996, particularly DMR for 3rd quarter, (Ex.5).

39 308 letter, enclosure question 1 (Ex.3); 308 response, enclosure response 1 including table entitled "Metals Concentrations," (Ex.4).

40 Annual Report for Year 1996, particularly DMR for 4th quarter, (Ex.5).

41 308 letter, enclosure question 1 (Ex.3); 308 response, enclosure response 1 including table entitled "Metals Concentrations," (Ex.4).

42 Annual Report for Year 1996, particularly DMR for 4th quarter, (Ex.5).

and 490.02 during 1997.[43]

22. Respondent failed to monitor its sewage sludge for arsenic and selenium during the first quarter of 1996.[44]

IV. ARGUMENT

A. Standard for Granting an Accelerated Decision

Pursuant to 40 CFR part 22.20 an accelerated decision may be rendered "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding." It is well settled that this standard for accelerated decision in EPA proceedings parallels the standard for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. In re: Corporacion para el Desarrollo Economico y Futuro de la Isla Nena, et al., CWA-11-97-61 (February 3, 1998) at 3, (Ex.11). In fact, the same principles apply to the resolution of such motions under the two sets of rules. See e.g., Id.; In re Tillamook County Creamery Ass'n., EPCRA-1094-03-01-325 (Sept. 18, 1995) at 4, (Ex.12). A factual issue that "defeats summary judgment must be one that requires further proceedings to find facts; 'an issue of law is no barrier to a summary judgment.'" Tillamook (quoting Agustin v. Quern, 611 F.2d 206, 209 (7th Cir. 1979)). See also, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986); Mellon Bank Corp. et al. v. First Union Real Estate Equity and Mortgage Invs., 951 F.2d 1399, 1404 (3d Cir. 1991) (An issue is "genuine" only when there is evidence sufficient to allow a reasonable fact-finder to find for the non-moving party).

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43 308 response at 1, (Ex.4).

44 Complaint at paragraph 11 (Ex.1); Answer at paragraph 17 (Ex.2); Annual Report for Year 1996 particularly DMR for 1st quarter (Ex.5); 308 letter, enclosure question 1b (Ex.3); 308 response, enclosure response 1b (Ex.4).

B. Respondent's Failure to Sample for Pollutants During the First Quarter of 1996

40 CFR part 503.17(a) requires a person who prepares, i.e., generates, sewage sludge to develop certain information, including the concentration of certain pollutants in such sludge.[45] Those pollutants are identified in 40 CFR part 503.13(b)(3), see 40 CFR part 503.17(a), and include arsenic and selenium. Respondent generates sewage sludge[46] and thus must develop this information.

40 CFR part 503.16 identifies the minimum frequency with which the generator must monitor the sewage sludge for those pollutants. That minimum frequency varies with the amount of sludge generated is land applied. Respondent land applied 335.84 dry metric tons of sewage sludge in 1996 and 490.02 dry metric tons in 1997.[47] Thus, in accordance with 40 CFR part 503.16 Respondent must monitor for arsenic and selenium at least once per quarter.

A review of Respondent's DMRs, however shows that Respondent failed to monitor its

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45 The particular subsection of 503.17(a) which applies to Respondent is 503.17(a)(4) because Respondent land applies bulk sewage meeting the class B pathogen requirements, see Annual Report for year 1996 (particularly pathogen requirements), (Ex.5), and the table 3 pollutant concentration limits, see id. (Respondent reporting on its DMRs only results of concentrations of pollutants in sludge, not information relevant to cumulative pollutant loading rate restrictions), (Ex.5). As discussed above, 503.17(a) is designed to accommodate various types of sludge treatment processes which generators may choose to employ. Compare 40 CFR part 503.17(a)(1)(I), (2)(I),(3)(I)(A), (4)(I)(A),(5)(I)(A) and (6)(ii). However, all subsections of 503.17(a) contain this same data gathering and requirement that generators develop information about the concentration of these pollutants in their sludge. Thus, regardless of how Respondent were to treat or land apply its sludge, this same recordkeeping requirement would apply.

46 Annual Report for Year 1996, enclosure pages entitled "Septage/Liquid Waste Treatment Facility; Operating Description and Operation Plan and Record Procedure," (Ex.5); 308 response, enclosure response 10a, (Ex.4).

47 308 response at 1 (Ex.4).

sewage sludge for Arsenic and Selenium during the first quarter of 1996.[48] In addition, Respondent admitted in its Answer as well as its 308 response that it failed to do so.[49] Thus, accelerated decision must be entered in favor of Complainant on this allegation of the Complaint.

C. Respondent's Repeated Exceedences of Pollutant Limits During 1996 and 1997

The Clean Water Act and its implementing regulations at 40 CFR part 503 provide limits on the amount of certain pollutants sludge may contain and still be applied to the land. Respondent's DMRs as well as information subsequently discovered by EPA that Respondent withheld from EPA when it submitted its DMRs shows that the sludge Respondent applied to the land on a number of occasions in 1996 and 1997 violated these limits.

Part 503 provides, *inter alia*, that

> Bulk sewage sludge or sewage sludge sold or given away in a bag or other container shall not be applied to the land if the concentration of any pollutant in the sewage sludge exceeds the ceiling concentration for the pollutant in Table 1 . . . .

40 CFR part 503.13(a)(1).

Respondent's DMRs demonstrate Respondent's violations. There is no dispute that on April 19, 1996 Respondent sampled its sludge and that the analysis of this sample stated that it contained 97 mg/kg of arsenic.[50] There is no dispute that Respondent reported that value to EPA

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48 Annual Report for Year 1996, particularly DMR for 1st quarter, (Ex.5).

49 Complaint at paragraph 11 (Ex.1); Answer at paragraph 17 (Ex.2); 308 letter, enclosure question b (Ex.3); 308 response, enclosure response b (Ex.4).

50 308 letter, enclosure questions 1 and 2 (Ex.3); 308 response, enclosure responses 1, 2&3 including table entitled "Metal Concentrations," (Ex.4).

on its DMR for the second quarter of 1996 and certified to its accuracy.[51] There is also no dispute that maximum allowable value for arsenic is 75 mg/kg.[52] Finally, there is no dispute that on April 19, May 2 and 15, 1996 Respondent applied that sludge to agricultural land.[53]

The same is true for Respondent's violations in 1997. There is no dispute that on March 18, 1997 Respondent sampled its sludge and that the analysis of this sample stated that it contained 370 mg/kg of cadmium and 1100 mg/kg of nickel.[54] There is no dispute that Respondent reported those values to EPA on its DMR for the first quarter of 1997 and certified to their accuracy.[55] There is also no dispute that the maximum allowable value for cadmium is 85 mg/kg and that the maximum allowable value for nickel is 420 mg/kg.[56] Finally, there is no dispute that on March 18, 24 and April 7-9, 1997 Respondent applied that sludge to agricultural land.[57]

In addition, information that Respondent withheld when it submitted its DMRs to EPA

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51 Annual Report for Year 1996, particularly DMR for 2nd quarter, (Ex.5).

52 40 CFR part 403.13(a) and Table 1 of 40 CFR part 503.13(b). That limit is also pre-printed on Respondent's DMR forms. See, e.g., Annual Report for Year 1996, particularly DMR for 2nd quarter ("75" appearing in grey box on row for arsenic permit requirement), (Ex.5).

53 308 letter, enclosure questions 1, 2 and 8 (Ex.3); 308 response, enclosure responses 1, 2&3, 8, 8a and 8e including tables entitled "Metals Concentrations" and "Sludge Land Application Data Sheet," (Ex.4).

54 308 letter, enclosure question 1 (Ex.3); response, enclosure response 1 including table entitled "Metal Concentrations," (Ex.4).

55 DMR for period 1/1/97 through 3/31/97, (Ex.6).

56 40 CFR part 503.13(a) and Table 1 of 40 CFR part 503.13(b). These limits are also pre-printed on Respondent's DMR forms. See, e.g., DMR for period 1/1/97 through 3/31/97 ("85" appearing in grey box on row for cadmium permit requirement; "420" appearing in grey box on row for nickel permit requirement), (Ex.6).

57 308 letter, enclosure questions 1, 2 and 8 (Ex.3); response, enclosure responses 1, 2&3, 8, 8a and 8e including tables entitled "Metals Concentrations" and "Sludge Land Application Data Sheet," (Ex.4).

demonstrates further violations. It is undisputed that Respondent sampled its sludge on June 25, 1996 and that the analysis of this sample stated that it contained 2100 mg/kg of nickel.[58] There is no dispute that the maximum allowable value for nickel is 420 mg/kg.[59] Finally, it is not disputed that on June 26, 27, July 2, 8-11, 17, 18 and 22, 1996 Respondent applied that sludge to agricultural land.[60]

Similarly, the facts pertaining to Respondent's August 26, 1996 sampling event are undisputed: Analysis of that sample stated that it contained 150 mg/kg of molybdenum;[61] the maximum allowable value for molybdenum is 75 mg/kg;[62] on August 26, September 20, 23 and 24, 1996 Respondent applied that sludge to agricultural land.[63]

Information, such as the above, which Respondent is required to develop and submit to EPA, may be used to establish Respondent's liability under the Clean Water Act. United States

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58 308 letter, enclosure questions 1 and 2 (Ex.3); 308 response, enclosure responses 1, 2&3 including table entitled "Metals Concentrations," (Ex.4).

59 40 CFR part 503.13(a)(1) and Table 1 of 40 CFR part 503.13(b). That limit is also pre-printed on Respondent's DMR forms. See, e.g., Annual Report for Year 1996, particularly DMR for 2nd quarter ("420"appearing in grey box in row for nickel permit requirement), (Ex.5).

60 308 letter, enclosure questions 1, 2 and 8 (Ex.3); 308 response, enclosure responses 1, 2&3, 8, 8a and 8e including tables entitled "Metals Concentrations" and "Sludge Land Application Data Sheet," (Ex.4). It should be noted that EPA learned of this exceedence only upon asking Respondent very specific questions under its 308 authority, because Respondent did not report this information to EPA on its DMRs. (See discussion of Respondent's violations for failure to report section IV. D. infra.)

61 308 letter, enclosure question 1 (Ex.3); 308 response, enclosure responses 1, 2&3 including table entitled "Metals Concentrations," (Ex.4).

62 40 CFR part 503.13(a)(1) and Table 1 of 40 CFR part 503.13(b). That limit is also pre-printed on Respondent DMR forms. See, e.g., Annual Report for Year 1996, particularly DMR for 3rd quarter ("75" appearing in grey box on row for molybdenum permit requirement), (Ex.5).

63 308 letter, enclosure questions 1, 2 and 8 (Ex.3); 308 response, enclosure responses 1, 2&3, 8, 8A and 8e including tables entitled "Metals Concentrations" and "Sludge Land Application Data Sheet," (Ex.4).

v. Ward, 448 U.S. 242 (1980) (report required under section 311 of the Clean Water Act used to establish liability); Sierra Club v. Simkins Indus., Inc., 847 F.2d 1109, 1115 n.8 (4th Cir. 1988) (required reports such as DMRs may be used as admissions to establish defendant's liability); SPIRG v. P.D. Oil & Chem. Storage, Inc.,627 F. Supp. 1074, 1090 (D.N.J. 1986) (summary judgment granted based upon defendant's admissions in official reports that its discharges exceeded effluent limits). In the present case, Respondent's liability for exceeding pollutant limits is established by its own sampling and analyses. Thus, Respondent must be found to have violated the Clean Water Act.

It is anticipated that even though the violations are demonstrated by Respondent's own sampling and analyses, Respondent will argue that it should not be held liable because the values which exceed the limits might have been caused by laboratory error. This argument is totally unavailing since the majority of courts have held that a defendant's own sampling and analysis reported to EPA constitutes conclusive evidence of a defendant's liability. Sierra Club v. Union Oil Co., 813 F.2d 1480 (9th Cir. 1987) (rejecting defendant's argument that defendant's own sampling and analytical results constituted on prima facie evidence of violations which defendant could attempt to impeach), vacated on other grounds and remanded, 485 U.S. 931 (1988), 853 F.2d 667 (1988) (modifying and remanding to district court), 716 F. Supp. 429 (N.D. Cal. 1988) (on remand reaffirming that information contained in DMRs constitutes conclusive evidence of exceedences and granting summary judgment in favor of plaintiff); United States v. Municipal authority of Union Township and Dean Dairy Products Inc., C.A.No. 1:CV-94-0621 (M.D. Pa. December 14, 1995) (rejecting defendant's assertion that it should be permitted to challenge the accuracy of the sampling and analysis information it had provided to EPA), (Ex.13); Connecticut

Fund for the Environment, Inc. v. Upjohn Co., 660 F. Supp. 1397 (D. Conn. 1987) (even though defendant produced credible evidence that the results of its own sampling and analysis may have been inaccurate, court held "that defense has no basis as a matter of law."); Atlantic States Legal Foundation v. Al Tech Specialty Steel Corp., 635 F. Supp. 284 (N.D. N.Y. 1986) (finding defendants cannot assert inaccurate measurements to avoid summary judgment). See also, NRDC v. Texaco Refining and Marketing, Inc., 719 F. Supp. 281, 288-89 (D.Del. 1989) (rejecting defendant's argument that court should consider whether exceedences were due to measurement error), vacated and remanded on other grounds, 906 F.2d 934 (3d Cir. 1990), on reconsideration, 800 F. Supp. 1 (D. Del. 1992) (rejecting defendant's arguments regarding the accuracy of their DMRs), aff'd in part and rev'd in part on other grounds and remanded, 2 F.3d 493 (1993), 20 F. Supp.2d 700 (D.Del. 1998) (entering judgment for plaintiff).

The reasons for this are manifest. Permitting a defendant to challenge its own sampling and analytical results would be inconsistent with the purposes of the Clean Water Act. Self-reporting is essential to the Clean Water Act, including the sludge regulating portion of that Act. The primary means available to EPA in determining whether a regulated entity is meeting the relevant pollutant limits (in this case those established by 503.13) is a review of the data those entities are required to submit to EPA. Thus, it would eviscerate the Act to permit regulated entities to submit inaccurate data to EPA without sanction.

This obvious fact is supported by the provisions of the Act itself which emphasize the critical nature of accurate self-reporting by providing criminal sanctions for knowing reporting inaccuracies:

Any person who knowingly makes any false material statement, representation, or

> certification in any application, record, report, plan or other document filed or required to be maintained under this chapter . . . shall upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than 2 years, or by both.

33 U.S.C. section 1319(c)(4), Clean Water Act section 309(c)(4).

Moreover, courts have recognized Congress's intention to prohibit challenges to self-monitoring data. The legislative history of the 1972 amendments to the Act provide:

> [T]he bill . . . establishes and makes precise new requirements imposed on persons and subject to enforcement. One purpose of these new requirements is to avoid the necessity of lengthy fact finding, investigations, and negotiations at the time of enforcement. Enforcement of violations of requirements under this Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay.

S. Rep. No. 414, 92nd Cong., 1st Sess. 64 reprinted in 1972 U.S.Code Cong. & Ad. News 3668, 3730. Thus, courts which have considered this issue in the NPDES context have recognized that "Congress did not intend the courts to be the forums for determining the adequacy or inadequacy of scientific measurements . . . ." Connecticut Fund for the Environment, 660 F.Supp. at 1417. See also United States v. Aluminum Co. of America, 824 F.Supp. 640 (E.D.Tx. 1993) (allowing reported data to constitute less than conclusive evidence of a violation would be inconsistent with Clean Water Act's legislative history); Union Oil, 813 F.2d at 1491 (if courts were to allow defendants to assert a defense of "sampling errors to excuse reported permit exceedences, [they] would be sanctioning countless additional hours of NPDES litigation and creating new, complicated factual questions for district courts to resolve. As indicated by the legislative history, Congress hoped to limit such situations."); NRDC v. Texaco, 719 F. Supp. at 288-89 (sampling error defense conflicts with Clean Water Act since Congress's intention was that courts not reconsider effluent discharge levels reported); Dean Dairy, C.A.No. 1:CV-94-0621 at *6-8 (following Union Oil rationale).

In addition, permitting a respondent to impeach its own reported data would have the "perverse" effect of rewarding sloppy monitoring and reporting practices. Union Oil, 813 F.2d at 1492.

The concern inherent in permitting defendants to impeach their own monitoring results is particularly important since defendants, who are the entities in control of the information, could "always claim that the reports filed with the E.P.A. were inaccurate due to measurement error." Al Tech, 635 F. Supp. at 289. Courts have therefore recognized that the risk of error must ultimately rest with the entity responsible for accurately gathering and reporting that data. Dean Dairy, C.A.No. 1:CV-94-0621 at *8.[64]

Thus, if Respondent in this case attempts to rebut its own data, this ploy should be rejected, and accelerated decision entered for Complainant.

D. Respondent's Repeated Failure to Report to EPA Data on the Concentration of Regulated Pollutants in Its Sludge.

Respondent failed numerous times to report results of sampling and analyses it performed

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64 Other courts have gone so far as to consider information proffered by defendants regarding the accuracy of their data, but imposed such a stringent standard that they held defendants' information was insufficient to raise a genuine issue of fact to preclude summary judgment. See e.g., United States v. Toledo, 867 F. Supp. 598 (N.D.Oh. 1994) (defendant's arguments failed to raise genuine issue of material fact; where defendant believes data may be inaccurate, the burden is on defendant to timely resolve that question); SPIRG v. Fritzsche, Dodge & Olcott, Inc., 579 F. Supp. 1528 (D.N.J. 1984) (information put forth by defendant that DMRs may be inaccurate rejected).

A small minority of courts have permitted defendants to present evidence to impeach their own sampling and analytical data, and declined to impose liability at the summary judgment stage based on that information. The case most frequently cited by defendants seeking to avoid liability is Friends of the Earth v. Facet Ent., Inc., 618 F. Supp. 532 (W.D.N.Y. 1984). That case, however, is unpersuasive since it provides no rationale for its decision or even an explanation of the information it considered sufficient to preclude summary judgment. One of the few other reported cases in which the court denied summary judgment for exceedences was one in which there was a great amount of evidence, particularly direct evidence in the form of split samples, that the reported values were erroneous. Importantly, the court made clear that even if at trial the fact finder were to determine that the reported values were not exceedences, liability would none-the-less be imposed since defendant's reporting of those inaccurate values would constitute reporting violations. Public Interest Research Group of New Jersey v. Elf Atochem North America, Inc., 817 F. Supp. 1164 (D.N.J. 1993).

on its sludge during 1996. This withholding of information constitutes numerous violations of the Clean Water Act and its implementing regulations at 40 CFR part 503.17(a) and 503.18.

Respondent, as a generator of sludge is required under 40 CFR part 503.17(a) to, *inter alia*, develop certain information about its sludge including the concentration of certain specified pollutants contained in it. 40 CFR part 503.17(a). Respondent is required by 40 CFR part 503.18(a) to annually report to EPA the information it has developed under part 503.17(a), about the concentrations of pollutants in their sludge.[65] Although the regulations simply require generators to report the information they have developed about the concentration of pollutants in their sludge (i.e., all concentrations determined by the generator) in 1995 Region III, in an effort to streamline the reporting process, sent a letter to generators stating that at that time Region III would consider the reporting requirements met if the generator reported only the highest concentration it obtained for each pollutant during its monitoring period as well as the highest monthly average value for each pollutant during that period. (That latter value can only differ from the former if the generator samples more than once per month.)[66]

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65 Respondent is required to report this information because it meets the requirements of 40 CFR part 503.18(a). It is a Class I sludge management facility because it is required to have an approved pretreatment program, NPDES permit number MD 0021571 effective September 1, 1985 at page 5 of 20; modification of NPDES permit number MD 0021571 effective February 1, 1988 at page 5 of 20 , and it has a design flow rate equal to or greater than one million gallons per day, NPDES permit number MD 0021571 effective September 1, 1985 at pages 2 through 4 of 20 (identifying flow as 4.4 mgd or 6.8 mgd), modification of NPDES permit number MD 0021571 effective February 1, 1988 at page 3 of 20 (identifying flow as 6.5 mgd), (Ex.7).

66 Letter from V. Binetti (EPA) re: Part 503 Sewage Sludge Standards dated January 1995 at 4, (Ex.8). Page 4 of this letter describes the four categories of information Region III wished to receive. Categories 1 and 2 refer to the amounts of pollutants that have been applied to fields, which information is not at issue here. Category 3 refers to the average of all concentration values obtained by the producer for a given pollutant during a given month while category 4 refers simply to the concentration of a given pollutant in any particular sample. EPA must be provided with the former value to determine whether the generator has complied with Table 3 of 40 CFR part 503.13(b) which enumerates pollutant limits in the form of monthly averages. EPA must be provided the latter

In its required annual report covering 1996 Respondent withheld much of the information it had gathered about the concentration of regulated pollutants in its sludge. Although Respondent sampled its sludge 11 times in 1996, it only reported the results of four sampling events. In particular, it reported the results it obtained from its sampling in March, April, July and October.[67] It withheld the results of all other sampling events even though many of the withheld values for various parameters were higher than those reported.[68] This is in direct contravention of 503.17(a) and 503.18.

Importantly, this meant that Respondent caused EPA to get an inaccurate picture of the nature of Respondent's sludge. For example, during the second quarter of 1996 Respondent reported that its sludge contained non-detectible amounts of lead, when other sampling during that quarter showed it contained 320 mg/kg of lead. Also in the third quarter of 1996 Respondent reported that its sludge contained only 160 mg/kg of copper when other sampling that quarter showed it to contain 710 mg/kg of copper.[69]

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value to determine whether the generator has complied with Table 1 of 40 CFR part 503.13(b) which enumerates pollutant limits in the form of individual sample results. See Letter from V. Binetti at 4, second and third full paragraphs, (Ex.8). As noted above, the second and third full paragraphs on page 4 EPA Region III stated that at that time it was satisfied if a generator reported only the highest single sample for each pollutant and the highest monthly average for each pollutant during the generator's monitoring period.

67 Compare Annual Report for Year 1996, particularly DMRs, (Ex.5), with 308 letter, enclosure question 1, (Ex.3) and 308 response, enclosure response 1 including table entitled "Metal Concentrations," (Ex.4).

68 Id.; see also excerpt from 308 response table entitled "Metal Concentrations" (highlighting those analytical values obtained by Respondent but not reported even though they were higher than those reported for that quarter), (Ex.9). Complainant only seeks to hold Respondent liable for those instances when the sampling results Respondent withheld were higher than those reported to EPA, i.e., where Respondent failed to report the highest value for each of those parameters for each quarter. Thus, for example, the Complaint does not allege a violation for Respondent's failure to report the two 1800 mg/kg sampling values for zinc obtained in the second quarter because the value Respondent reported, 1900 mg/kg, was higher than the values withheld.

69 Compare Annual Report for Year 1996, particularly DMRs, (Ex.5), with 308 letter, enclosure question 1, (Ex.3) and 308 response, enclosure response 1 including table entitled "Metal Concentrations," (Ex.4).

Perhaps more significantly, however, Respondent's withholding of this sampling and analysis information hampered EPA in identifying Respondent's exceedences of the regulatory limits. As noted above, at least one of the values Respondent withheld (the 2100 mg/kg analytical result for nickel from the second quarter of 1996) exceeded the limits established by 503.13(b) Table 1 and thus constituted a violation when Respondent land applied that material. EPA would never have known of this violation if it had not issued a very detailed 308 letter to Respondent, since Respondent withheld this information about the concentration of this pollutant in its sludge when it filed its annual report covering 1996.[70]

Respondent's withholding of information about the concentration of regulated pollutants in its sludge constitutes multiple violations of the Clean Water Act and its implementing regulations 503.17(a) and 503.18(a). Accelerated decision must, therefore, be entered in favor of Complainant on this issue.

V. CONCLUSION

Complainant respectfully requests that judgement on liability as a matter of law be entered in favor of Complainant and against Respondent. In the alternative, since partial accelerated decisions are allowable under 40 CFR part 22.20, Complainant seeks an accelerated

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70 Compare 308 letter, enclosure question 1, (Ex.3) and 308 response, enclosure response 1 including table entitled "Metal Concentrations" (June 25, 1996 sample for nickel), (Ex.4), with Annual Report for Year 1996, particularly DMR for 2nd quarter where Respondent reported 220 mg/kg of nickel, (Ex.5).

decision on every element for which the Court determines no genuine issue of material fact exists.

Respectfully submitted,

Date: 5/21/99

Kerry Nelson
Assistant Regional Counsel
Office of Regional Counsel

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION III

CERTIFICATE OF SERVICE

I certify that on the date noted below, I filed with the Regional Hearing Clerk, USEPA Region III and sent by first class mail, a copy Complainant's Motion for an Accelerated Decision, including its memorandum in support thereof and proposed order to the following:

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